UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD ELLENBERGER, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C06-1310-JLR REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Donald Ellenberger proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1953.[1] He completed high school and received vocational

[1] Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

training to become a welder. Plaintiff previously worked as a shipfitter.

Plaintiff filed an application for DI benefits in October 2002, alleging disability since January 30, 2002. (AR 61-63.) His application was denied at the initial level and he did not seek further review.

Plaintiff reapplied for DI benefits in March 2003, alleging disability since August 2, 2002. (AR 64-65.) This application was denied at the initial level and on reconsideration, and plaintiff timely requested a hearing. On May 2, 2005, ALJ Cheri Filion held a hearing, taking testimony from plaintiff. (AR 294-313.) At the hearing, plaintiff sought to amend his alleged onset date to the day after his fiftieth birthday in July 2003. (AR 306.) ALJ Filion issued a decision on November 17, 2005 finding plaintiff not disabled. (AR 13-22.) She declined to reopen plaintiff's initial claim and ultimately concluded that plaintiff was not disabled at step five from August 2, 2002 through November 30, 2004 and not disabled at step one as of December 1, 2004. (*Id.*)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on July 21, 2006, making the ALJ's decision the final decision of the Commissioner. (AR 6-9.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must

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official policy on privacy adopted by the Judicial Conference of the United States.

be determined whether the claimant is gainfully employed. The ALJ found plaintiff had engaged in substantial gainful activity (SGA) since December 1, 2004, but had not engaged in SGA between August 2, 2002 and November 30, 2004. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's right ankle fracture status post fusion and degenerative changes of the back severe. She also found that while plaintiff's essential tremor was not a severe impairment prior to December 1, 2004, it worsened and was presently severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found him unable to perform his past relevant work. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Applying the Medical-Vocational Guidelines for the period between August 2, 2002 and November 30, 2004, the ALJ found plaintiff capable of performing the full range of light work and, therefore, not disabled at step five.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750

(9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erred in ignoring and/or rejecting opinions of examining physicians, in rejecting the existence of a severe tremor prior to December 2004, in finding that he engaged in SGA since December 2004, and in assessing his credibility. He requests remand for an award of benefits or, alternatively, for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed. For the reasons described below, the Court finds further administrative proceedings called for in this case.

Step One

The ALJ found as follows at step one:

> The claimant is 52 years old and has a high school education and training in welding. His past work experience includes employment as a shipfitter. Since February of 2004 the claimant has worked as a caregiver for his mother and is paid for these services through the Department of Social and Health Services' (DSHS) Community Options Program Entry System (COPES). From February 5, 2004 through November 30, 2004, DSHS authorized 60 hours of care per month at $8.93 per hour for a total of $535.80 per month, which is below the presumptive threshold for substantial gainful activity. Beginning December 1, 2004, 111 hours of care per month were authorized for a total of $999.23 per month paid for caregiver services, which exceeds the presumptive threshold for substantial gainful activity. Counsel has argued that the claimant is unable to provide all of the services and that the claimant's ex-wife and sister provide services when the claimant is unable to do so as a result of his impairments. COPES records list the claimant's sister as an informal provider and make no mention the [stet] claimant's ex-wife. The claimant's assigned tasks include assisting his mother with bathing, bed mobility, dressing, eating, getting around inside and outside the residence, medication management, personal hygiene, using the telephone, toilet use, transfers, and transportation. His sister's assigned tasks as an informal provider include bathing, finances, and transportation. The medical records reflect that on January 10, 2005 the claimant stated that he was the

> sole care provider for his mother and that his sisters were of minimal assistance. When contacted by DSHS on April 14, 2005, the claimant reported that he was performing all of the tasks stated in the service summary. The caregiver services that the claimant provides obviously involve significant physical and mental activities and he has not alleged any impairment related work expenses. Based on the monthly amounts paid by DSHS for caregiver services, I find that the claimant has engaged in substantial gainful activity since December 1, 2004 and is therefore not disabled as of that date. I find that the claimant did not engage in substantial gainful activity between August 2, 2002 and November 30, 2004. As a result, it is necessary to continue with the sequential evaluation.

(AR 13 (internal citations to record omitted).) (*See also* AR 18 (discussing plaintiff's work as a caregiver in assessing his credibility).)

Generally, in evaluating work activity to determine whether it constitutes SGA, an individual's earnings are the primary consideration. 20 C.F.R. § 404.1574(a)(1). For work performed in 2004, average earnings of more than $810.00 per month are presumptive of SGA. *See* 20 C.F.R. § 404.1574(b) and http://www.ssa.gov/pressoffice/factsheets/colafacts 2005. htm. For work performed in 2005, average earnings of more than $830.00 per month are presumptive of SGA. *Id*.

Plaintiff notes that, while the same earning guidelines apply, Social Security regulations distinguish between employees and the self-employed. *Compare* 20 C.F.R. § 404.1574 (employees), *with* 20 C.F.R. § 404.1575 (self-employed). He maintains that the ALJ should have treated him as self-employed and deducted "normal business expenses" from his gross income. 20 C.F.R. § 404.1575(c). He points to evidence submitted to the Appeals Council showing that he used some of his COPES income to pay for his mother's food, gas, utilities, and other expenses. (*See* AR 282 (declaration from plaintiff's sister indicating that plaintiff's mother received $842.00 per month in Social Security benefits, but had expenses well in excess of that amount and

indicating that plaintiff paid for various expenses, including food, gas, car repairs, and cable and telephone bills) and AR 291 (plaintiff's declaration indicating that he used a significant portion of his COPES income to pay for his mother's living expenses, including food, utilities, transportation costs, and miscellaneous personal items).) Plaintiff also asserts that deductions should have been made for "the reasonable value of any significant amount of unpaid help furnished by [his] spouse, children, or others." 20 C.F.R. § 404.1575(c). He points to evidence submitted to the Appeals Council indicating that he never bathed or groomed his mother, and that his sister or ex-wife spent from thirty minutes to an hour per day taking care of his mother's personal hygiene. (*See* AR 281, 283, 291.)

Plaintiff also argues that the ALJ erred in failing to adequately develop the record on this issue. *See* 20 C.F.R. § 404.944 ("At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues. The administrative law judge may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing.") He asserts that the ALJ truncated the hearing, rather than taking detailed testimony on this issue, and suggested that plaintiff could provide further testimony at a supplemental hearing, which was never held. (*See* AR 310-11.)

The Commissioner notes that the declarations submitted to the Appeals Council were not before the ALJ and avers that such evidence should only be reviewed to determine whether a remand is necessary to allow the ALJ to consider the evidence, not for an award of benefits. *See Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000) ("While we properly may consider the additional evidence presented to the Appeals Council in determining whether the Commissioner's

denial of benefits is supported by substantial evidence, it is another matter to hold on the basis of evidence that the ALJ has had no opportunity to evaluate that Appellant is entitled to benefits as a matter of law.") The Commissioner argues that the evidence submitted to the Appeals Council would not have changed the outcome in this case. He notes that the ALJ already considered plaintiff's argument that his ex-wife and sister provided certain services. The Commissioner further asserts that the expenses identified do not qualify as impairment related work expenses (IRWE) as defined in Social Security Ruling (SSR) 84-26 ("An IRWE means an expense for an item or service which is directly related to enabling an impaired individual to work and which is necessarily incurred by that individual because of a physical or mental impairment."). He states that the issue is not how plaintiff spent his earnings, but his ability to perform SGA, which is demonstrated both by his own statements and his earnings.

Plaintiff does not argue that he had any IRWE. However, he also does not establish that the ALJ erred with respect to the issue of business expenses. That is, while plaintiff clearly gave his mother money to pay for her expenses, these payments were not his own "normal business expenses." For example, plaintiff indicates that he paid for his mother's transportation costs, not that he used his COPES income to pay for his own transportation costs necessary to the care for his mother. (*See* AR 291.) In fact, it appears that, at least for some period of time, plaintiff lived in his mother's home. (*See* AR 279-80, 297.)

Also, the ALJ appropriately relied on contrary evidence in the record to discount plaintiff's assertion as to services provided by his sister and ex-wife. With respect to these services, the Court clarifies that plaintiff attested that he did not bathe or assist in bathing his mother due to issues of privacy, not because he was unable to do so because of his impairments. (*See* AR 291;

see also AR 281.)

Finally, plaintiff's argument that the ALJ failed to adequately develop the record on this issue is not well taken. The ALJ did indicate that she would hold a supplemental hearing if necessary. (*See* AR 310.) Yet, she also took some testimony on the issue of plaintiff's work as a caregiver and his COPES income (*see* AR 299-302, 311), raised her concerns as to this work and income (*see* AR 307, 312), and indicated that she needed more information on this issue (*see* AR 307, 309-12). Plaintiff subsequently submitted a substantial amount of relevant documentation (*see* AR 58, 139-204), which the ALJ relied on in making her decision (*see* AR 14). Also, the ALJ informed plaintiff of his right to request a supplemental hearing in a letter dated four months prior to her decision (*see* AR 59-60), but it does not appear plaintiff ever made such a request. Finally, plaintiff submitted his declaration and the declaration from his sister to the Appeals Council, after the ALJ's decision. (*See* AR 279-91.)

Given all of the above, the undersigned concludes that plaintiff fails to demonstrate any error in the ALJ's step one finding. This finding is supported by substantial evidence and should be upheld.

Step Two

At step two, a claimant must make a threshold showing that his medically determinable impairments significantly limit his ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's

ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting SSR 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id*.

Plaintiff argues that the ALJ erred in considering his tremor at step two. In an October 10, 2004 examination, Greg McGriff, ARNP, stated: "The patient has very fine tremors which are bothersome but not distressing and there are no other associated symptoms of any sort." (AR 236.) In a January 10, 2005 examination with ARNP McGriff, plaintiff reported "a history of tremors, which are annoying but not distressing." (AR 233.) During a June 2005 consultative examination with Dr. Aigner, performed at the request of the ALJ, plaintiff reported that his tremor began eight to ten years ago and was "getting worse." (AR 254.) He indicated that this was one reason he had to leave his position as a ship fitter and that he drops things, but that he had never had the tremor evaluated. (*Id*.) On examination, Dr. Aigner observed "a tremor of the outstretched hands, which increases slightly on finger/nose/finger testing." (AR 257.) Dr. Aigner also stated: "[H]is tremor is quite marked and occurs with coordinated activity." (AR 258.) Dr. Aigner diagnosed plaintiff with "an essential tremor, which is hereditary and affects his upper extremities," adding that "[i]t occurs with any activity requiring the use of his arms and hands[,]" and that "[a] combination of his pain and the tremor contributes to his disability." (AR 258-59.)

In considering plaintiff's tremor, the ALJ found:

> His essential tremor is presently a severe impairment. However, the record contains no mention of this condition prior to October of 2004 and it was not until June of 2005 that Dr. Aigner opined that the tremor would impact coordination. On January 10, 2005, Nurse McGriff described the claimant's tremor as annoying, but not distressing. I therefore find that the claimant's essential tremor was not a severe

> impairment through December 1, 2004, when he began engaging in substantial gainful activity.

(AR 18 (internal citation to record omitted).) (*See also* AR 21 ("His essential tremor was not a severe impairment prior to December 1, 2004, although is has since worsened and is presently severe.")) She also noted, in assessing plaintiff's credibility: "At the evaluation with Dr. Aigner the claimant reported that his tremor made it difficult to cut straight lines in his work as a shipfitter. However, I do not credit this since the claimant does not mention a tremor on his disability reports or at the evaluation with Dr. Ho." (AR 18.)

Plaintiff argues that, if the Court agrees that substantial evidence does not support the ALJ's step one finding as of December 1, 2004, the Court should hold that substantial evidence would not support the ALJ's decision with respect to that time period given the acknowledged severity of his tremor at some point after that same date. Plaintiff also argues that substantial evidence does not support the step two finding prior to December 1, 2004. He equates his January 2005 statement that his tremor was "annoying" (AR 233) with an assertion that it interfered with his functioning. He also criticizes the ALJ's reliance on the lack of prior documentation, averring that the record supports the conclusion that he was enduring a longstanding, hereditary condition which had previously interfered with his work as a shipfitter. (*See* AR 233, 258 & 264.)

The Commissioner argues that Dr. Aigner's report does not support a severe tremor prior to December 1, 2004, noting that Dr. Aigner's opinions were rendered during the time plaintiff was found to be performing SGA. The Commissioner clarifies that plaintiff informed ARNP McGriff that his tremor was annoying, not that it interfered with his functioning. He also notes

that none of the records cited by plaintiff indicate that his tremor was severe prior to December 1, 2004.

Plaintiff fails to establish any error with respect to his tremor. Rather than helping his argument, the reports to ARNP McGriff minimize the severity of this condition. Also, while substantiating the severity of the condition as of June 2005, Dr. Aigner's report speaks to the history of plaintiff's tremor only as reported by plaintiff. As such, the undersigned concludes that the ALJ's step two finding is supported by substantial evidence and should be upheld.[2]

Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion of the treating physician is contradicted, and the non-treating physician's opinion is based on independent clinical findings that differ from those of the treating physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d

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[2] In the opening brief, plaintiff's counsel states that the ALJ "conceded" that plaintiff's tremor became severe at a certain point and "admitted" an impact on her RFC finding. (*See* Dkt. 12 at 13-14.) This terminology is inappropriately used with respect to the ALJ, who makes findings and reaches conclusions, rather than the Commissioner, who is a party to this case.

1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id*.

"Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*, 81 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true, the evidence supports a finding of disability. *See, e.g.*, *Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional limitations is sufficient to meet or equal [a listing.]"); *Smolen*, 80 F.3d at 1292 (ALJ's reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay testimony legally insufficient; finding record fully developed and disability finding clearly required).

However, courts retain flexibility in applying this "'crediting as true' theory." *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there were insufficient findings as to whether plaintiff's testimony should be credited as true). As stated by one district court: "In some cases, automatic reversal would bestow a benefits windfall upon an undeserving, able claimant." *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that some of his stated reasons for rejecting a physician's opinion were legally insufficient).

A. Dr. Marie Ho

Plaintiff argues that the ALJ failed to account for the June 2003 opinion of examining

physician Dr. Marie Ho as to his slow and stiff gait. (AR 220, 222 ("He is limited to standing and walking cumulatively six hours in an eight-hour day due to limitations and pain of the right ankle and lumbar spine. The claimant has a slow and stiff gait with a slight limp.")) Plaintiff notes the ALJ's finding that he could perform a full range of light work, which requires the ability to stand and/or walk for a total of six hours in an eight-hour day. *See* SSR 83-10. He asserts that Dr. Ho essentially opined that his ability to stand and/or walk was significantly reduced by his ability to walk only with a slow and stiff gait.

Plaintiff first argues that the ALJ erred in not giving any reason to reject Dr. Ho's opinion as to the pace and style of his gait, noting that she did assign substantial weight to Dr. Ho's opinions generally. (*See* AR 17.) Plaintiff asserts that substantial evidence, therefore, does not support the RFC assessment. Plaintiff next argues that, given his slow and stiff gait, the ALJ erred in not consulting a vocational expert at step five. *See, e.g., Tackett v. Apfel* , 180 F.3d 1094, 1101-04 (9th Cir. 1999) ("The ALJ may rely on the grids alone to show the availability of jobs for the claimant 'only when the grids accurately and completely describe the claimant's abilities and limitations.'"; where a claimant has a significant limitation not contemplated by the Medical-Vocational Guidelines, an ALJ must call a vocational expert) (quoting *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)).

The Commissioner concedes that the ALJ did not provide a reason to reject Dr. Ho's opinion as to plaintiff's "slow and stiff gait with a slight limp[]" (AR 222), but maintains that any error should be deemed harmless in that it was inconsequential to the ultimate nondisability determination in this case. *See Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006) (an error may be deemed harmless where it is "irrelevant to the ALJ's ultimate

disability conclusion.") That is, he asserts that Dr. Ho took into consideration plaintiff's slow and stiff gait with a slight limp in assessing his ability, including an ability to stand and walk for six hours in an eight hour day, and did not indicate that the slow and stiff gait with a slight limp significantly reduced plaintiff's ability to perform as such. The Commissioner further maintains that, because Dr. Ho's assessment of plaintiff's abilities corresponds to the abilities necessary to perform the full range of light work, the ALJ properly applied the Medical-Vocational Guidelines at step five.

In reply, plaintiff asks that the Court reject the Commissioner's attempt to conflate the total amount of standing and/or walking a claimant can perform with how fast the claimant ambulates. He points to unskilled light jobs in which an individual's pace would be highly relevant. *See, e.g.*, Dictionary of Occupational Titles (DOT) No. 311.677-010 (counter attendant, cafeteria; duties include: "Carries trays from food counters to tables for cafeteria patrons. Carries dirty dishes to kitchen. . . . May circulate among diners and serve coffee and be designated Coffee Server[.]"); and DOT No. 323.687-014 (cleaner, housekeeping; duties include: "Cleans rooms and halls in commercial establishments . . . , performing any combination of following duties: Sorts, counts, folds, marks, or carries linens. Makes beds. Replenishes supplies, such as drinking glasses and writing supplies. Checks wraps and renders personal assistance to patrons. Moves furniture, hangs drapes, and rolls carpets.") Plaintiff also rejects the contention that the ALJ accounted for the additional limitations in assessing plaintiff's abilities, noting again that Dr. Ho opined: "He is limited to standing and walking cumulatively six hours in an eight-hour day due to limitations and pain of the right ankle and lumbar spine. The claimant has a slow and stiff gait with a slight limp." (AR 222.)

Dr. Ho did not note plaintiff's slow and stiff gait with a slight limp, but nonetheless find him able to stand and/or walk to the extent required in light work. Instead, she found plaintiff able to stand and walk for the duration required in light work and added an observation – a slow and stiff gait with a slight limp. The ALJ noted Dr. Ho's opinion as to a slow and stiff gait, but did not address this opinion in assessing plaintiff's RFC. (*See* AR 15, 19-20.) Dr. Ho rendered his opinions in June 2003 and, therefore, his opinion as to plaintiff's slow and stiff gait with a slight limp is pertinent to the time period prior to plaintiff's performance of SGA. The undersigned concludes that the ALJ's failure to directly address this opinion is an error necessitating remand for further consideration of the opinions of Dr. Ho and plaintiff's RFC. As argued by plaintiff, to the extent the ALJ accepts this opinion and to the extent it constitutes a significant limitation not contemplated by the Medical-Vocational Guidelines, a vocational expert will be required at step five. *See*, *e.g.*, *Tackett*, 180 F.3d at 1101-04.

B. Dr. B. Robert Aigner

Plaintiff also argues that the ALJ erroneously rejected the opinions of Dr. B. Robert Aigner. Dr. Aigner found that plaintiff could lift only ten pounds, could stand and/or walk less than two hours in an eight-hour day, could sit less than six hours in an eight-hour day, could never climb, balance, kneel, crouch, crawl, or stoop, had a limited ability to reach, handle, and finger, and should avoid hazards. (*See* AR 262-65.) Dr. Aigner found that "[t]he combination of his complaints makes his [sic] significantly impaired." (AR 259.)

The ALJ described Dr. Aigner's evaluation and indicated that he did "not assign significant weight to Dr. Aigner's opinion regarding the claimant's physical limitations." (AR 16-17.) He explained:

> [Dr. Aigner] opined that the claimant could lift and/or carry only 10 pounds occasionally, but the claimant indicated he could lift 30 to 40 pounds. The claimant continued to work as a caregiver at the time of that evaluation and his duties obviously exceed the functional limits opined by Dr. Aigner. Dr. Aigner also opined that the claimant's essential tremor was significant with respect to controlling coordinated activities. However, the medical records contain no mention of the tremor prior to October of 2004, which was only a couple of months before the claimant's work as a caregiver increased to the level of substantial gainful activity.

(AR 17 (internal citations to record omitted).)

Plaintiff notes that Dr. Aigner's findings correspond to a less than full range of sedentary work. *See* SSR 83-10 and 96-9p (sedentary work requires the ability to lift no more than ten pounds, to stand and/or walk for a total of about two hours a day, and to sit for a total of about six hours in a day). He further notes that an individual with these limitations and his vocational profile is disabled at step five as a matter of law. *See* 20 C.F.R. pt. 404, Subpt. P, App. 2, Table 1, Rule 201.14 (an individual limited to sedentary work, closely approaching advanced age, with a high school degree or more and no transferable skills is disabled).

Plaintiff argues that the ALJ failed to give sufficient reasons for rejecting Dr. Aigner's opinions. He first notes that, unlike Dr. Ho or the non-examining state-agency physicians, Dr. Aigner reviewed x-ray evidence. (*See* AR 252-58.) He maintains the relevance of the May 2005 x-rays to the earlier time period given that they revealed degenerative changes, not traumatic injuries sustained after December 1, 2004. (*See* AR 246-47.) Plaintiff next avers that the ALJ failed to grapple with many of the objective findings Dr. Aigner noted, including a reduced forward flexion and an inability to stoop. (*See* AR 256, 263.) Plaintiff also asserts that the ALJ unreasonably found Dr. Aigner's ten-pound lifting limit unwarranted based on plaintiff's admission that he could lift thirty or forty pounds. He notes that RFC refers to the ability to work on a

sustained basis, for eight hours a day, five days per week or an equivalent schedule, *see* SSR 96-8p, and that, in an April 2003 questionnaire, he merely stated that he could "sometimes maybe on a good day" lift thirty pounds (AR 117). Finally, plaintiff takes issue with the ALJ's reliance on the fact that he cared for his mother, in that he alleges that activity never approached the level of full-time, sustained work contemplated by SSR 96-8p. *See also supra* at 9-11 (discussing Dr. Aigner's opinion regarding plaintiff's tremor).

The Commissioner concedes that the ALJ erred in stating that plaintiff reported an ability to lift forty pounds, but argues that this error was harmless given that plaintiff never reported difficulty lifting twenty pounds – as is occasionally required with light work. *See* SSR 83-10 (light work requires lifting no more than twenty pounds at a time, with frequent lifting of up to ten pounds). The Commissioner also notes that, although stating he could lift thirty pounds "sometimes maybe on a good day[,]" plaintiff on the same form indicated he could lift that amount occasionally. (AR 117.) He clarifies that the ALJ here pointed out that plaintiff's work as a caregiver exceeded the functional limits opined by Dr. Aigner, not that it approached the level of full-time work. Pointing to all of these reasons, the Commissioner asserts that an ALJ may reject a doctor's opinions when inconsistent with a claimant's activities, *see Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001), and with medical reports in the record, *see Lester*, 81 F.3d at 831. The Commissioner also disputes the relevance of Dr. Aigner's consideration of x-rays from 2005 and various objective findings, noting that the ALJ, in any event, found plaintiff had engaged in SGA since December 1, 2004. *See* 20 C.F.R. § 404.1520(b) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.") (emphasis added).

In reply, plaintiff avers that the ALJ never found Dr. Aigner's opinions irrelevant based on the fact that plaintiff was performing SGA at the time, but declined to assign them significant weight on that basis. He adds that the ALJ did not find Dr. Aigner's opinions irrelevant to the period prior to December 1, 2004, when the ALJ found he was not performing SGA. He clarifies that his ability to lift thirty pounds "occasionally" was also qualified by his statement "sometimes maybe on a good day[.]" (AR 117.)

As asserted by plaintiff, his qualification "sometimes maybe on a good day" is reasonably read to apply to both the amount and frequency of his lifting abilities. (*See id*.) As such, the ALJ's first reason for not assigning significant weight to Dr. Aigner's opinions does not withstand scrutiny. However, plaintiff does not demonstrate error with respect to the other two reasons provided by the ALJ. As argued by respondent, the ALJ stated that plaintiff's work as a caregiver exceeded the functional limits opined by Dr. Aigner, not that it approached the level of full-time work, and the ALJ may rely on such inconsistencies in assessing a doctor's opinions, *see Rollins*, 261 F.3d at 856. Also, given the ALJ's step one and step two findings, she did not err in questioning Dr. Aigner's opinion as to plaintiff's tremor based on the lack of prior medical evidence and his work as a caregiver. Accordingly, the undersigned concludes that the ALJ provided sufficient reasons for not assigning significant weight to Dr. Aigner's June 2005 opinions. However, on remand, the ALJ should correct the error with respect to plaintiff's admission of his lifting capabilities.

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*

also Thomas, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

The ALJ rendered the following credibility decision in this case:

> In weighing the claimant's subjective complaints against the objective evidence, I find that he is not entirely credible. His impairments would reasonably be expected to cause some pain and limitation. However, his daily activities demonstrate that he is more functional than alleged. The claimant initially stopped working as a result of a lay off, which he attributed to both a lack of work and to his impairments. On his first disability report he stated that he did not know how he could continue to work as a shipfitter which was very physically demanding. This is consistent with the medical evidence given Dr. Talbot's and Nurse McGriff's opinions. However, no doctor or other health care professional of record opined that the claimant's impairments precluded all work prior to December 1, 2004, when his work as a caregiver became substantial gainful activity. At the hearing, counsel moved to amend the alleged disability onset date to the date of the claimant's 50th birthday and noted that the claimant received unemployment compensation until that time. In order to receive such benefits, the claimant had to certify that he was ready, willing, and able to work. The fact that the claimant previously claimed that he could work during the same period in which he now alleges disability detracts from his credibility. I agree that the claimant can no longer work as a shipfitter, and I do not doubt that his layoff was in part due to his physical limitations, however, the inability to engage in his past heavy work is not dispositive of the case.

> The claimant's work as a caregiver and his other daily activities demonstrate that he remains fairly capable despite his impairments. His activities include assisting his mother, preparing meals, grocery shopping, driving, performing housework, and pulling weeds. The claimant has asserted that he requires assistance in his duties as a caregiver as a result of his impairments. However, he is the primary caregiver for his mother and on more than one occasion complained that he received little assistance in this regard. On January 2, 2005, the claimant described himself as the sole caregiver and complained that his sisters were of minimal assistance. His ex-wife did not live with him for a time and she is not listed as an informal provider. When the claimant was contacted by DSHS on April 14, 2005, he reported that he was performing all of the tasks stated in the service summary. Clearly, he is representing himself out to the state as the primary caretaker for which he is accepting payment from the state. His testimony in this forum is inconsistent with his paid status with the State of Washington and is not accepted. I note that his duties as a caregiver include assisting his mother with mobility and getting around inside and outside the residence. These duties are consistent with medium level work described in the Dictionary of Occupational Titles (Home attendant, DOT # 354.377-014).
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> There are additional factors that erode the claimant's credibility. The claimant did not take anything stronger than ibuprofen for his pain prior to October of 2004. He subsequently reported some improvement with Indocin and Robaxin and did not feel that he needed narcotic pain medication. The claimant testified that he used a cane for balance, but this was not prescribed by a doctor. Dr. Ho opined that a cane was not medically necessary. I note that the claimant's ability to assist his mother in getting around indicates that he does not require a cane for support. At the evaluation with Dr. Aigner the claimant reported that his tremor made it difficult to cut straight lines in his work as a shipfitter. However, I do not credit this since the claimant does not mention a tremor on his disability reports or at the evaluation with Dr. Ho.

(AR 17-18 (internal citations to record omitted).)

Plaintiff first asserts error in the ALJ's reliance on a purported inconsistency between his applications for unemployment and disability benefits. He notes that he amended his alleged onset date to his fiftieth birthday in July 2003 to defeat such an inconsistency. (*See* AR 306 (at the hearing, plaintiff's counsel acknowledged that plaintiff received unemployment benefits for about a year after his final layoff and moved to amend his onset date to the day after his fiftieth birthday).) Further, he argues that there is no necessary inconsistency, stating that he is disabled

as a matter of law at step five even if he can perform every sedentary level job in the State of Washington. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 1, Rule 201.14. *See also* 20 C.F.R. § 416.210(a)-(b) (an individual is not eligible for Supplemental Security Income benefits if he or she does not apply for all other benefits, including unemployment, for which he or she is eligible).

Plaintiff also asserts error in the ALJ's assertion that he was performing "medium" level work caring for his mother. He points to Dr. Aigner's findings, including difficulty in standing, walking, and using his hands (*see* AR 259), as strong evidence that he was not performing SGA. He also asserts the absence of any evidence that his work for his mother approached medium level work eight hours a day, for five days a week.

The Commissioner argues that the ALJ properly relied on inconsistencies in evaluating plaintiff's credibility. *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). He notes the absence of any authority for the proposition that the ALJ was bound to accept an amended onset date, and argues that the ALJ, in any event, provided appropriate rationale for the entire time period at issue in this case. Additionally, in response to plaintiff's argument that he is disabled as a matter of law, the Commissioner notes that the ALJ found plaintiff able to perform light, not sedentary work. He also points to the ALJ's other reasons for finding plaintiff not fully credible, including evidence as to his daily activities, his medication, his use of a cane, his ability to assist his mother, and the absence of prior evidence as to a tremor.

In reply, plaintiff notes that claimants routinely amend alleged onset dates. *See* Program Operations Manual System (POMS) DI § 25501.001 ("A change in the [alleged onset date (AOD)] may be provided on an SSA-5002, a letter, or in another document.") and POMS DI § 25501.050 ("Onset development may be undertaken to set an onset earlier or later than the AOD,

if warranted by the medical and/or vocational evidence.") Plaintiff also asserts that affirming the ALJ's credibility decision would be premature given that the ALJ failed to properly evaluate x-ray and other objective evidence.

Plaintiff is permitted to amend his alleged onset date. However, this does not mean the ALJ cannot find the fact that plaintiff earlier alleged disability at a time when he had also asserted his qualification for unemployment compensation detracted from his credibility. Nor did the ALJ err in finding an inconsistency between plaintiff's purported degree of impairment and his daily activities, including his care for his mother. Moreover, as noted by the Commissioner, the ALJ also cited several other reasons in support of his credibility determination. Plaintiff does not demonstrate any error with respect to those reasons. As such, the undersigned concludes that the ALJ provided clear and convincing reasons for finding plaintiff not entirely credible.

However, given the ALJ's error with respect to Dr. Ho, and the resulting implication on the RFC assessment and probable need for vocational expert testimony at step five, the ALJ's credibility decision may be implicated and require reassessment on remand. Also, although the ALJ did not err in noting an inconsistency between plaintiff's earlier assertion as to his disability onset date and assertions he made in order to qualify for unemployment compensation, she should, on remand, only consider plaintiff's claim for benefits as of the day after his fiftieth birthday in July 2003, his amended alleged onset date, through November 30, 2004.

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CONCLUSION

For the reasons set forth above, this matter should be REMANDED for further administrative proceedings.

DATED this 27th day of June, 2006.

Mary Alice Theiler
United States Magistrate Judge